

# Ireland's Response to the COVID-19 Pandemic

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Alan Greene

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Like many countries around the world, Ireland has enacted emergency legislation to respond to the coronavirus pandemic. The scope of these powers are vast, impacting on almost every aspect of life in Ireland. Notably, no state of emergency has been declared in accordance with Ireland's constitutional provisions or under Article 15 of the European Convention on Human Rights (ECHR).

## Ireland's Constitutional Emergency Provisions

Enacted in 1937, Ireland's principal constitutional emergency provisions are outlined [in Article 28.3.3°](#); however, a state of emergency can only be declared by the Oireachtas (Ireland's bicameral legislature consisting of the Dáil—lower house—and Seanad—upper house) 'in time of war or armed rebellion'. The meaning of 'time of war or armed rebellion' has been amended twice within the first 3 years of the Constitution coming into effect and so a referendum was not required in accordance with the Constitution's transitory provisions. [The first amendment](#) allowed the state to declare an emergency in response to the outbreak of World War II as it was felt that the meaning of 'war' in Article 28.3.3° may not have included a so-called 'neutrality emergency'—a war in which the state was not a belligerent. [This amendment, although drafted in April 1939, was not introduced to the Oireachtas until the 2 September 1939 following Germany's invasion of Poland the previous day.](#) It passed through the Oireachtas in a mere 3 hours and a state of emergency was declared.

The [second amendment to Article 28.3.3°](#) was enacted in 1941 to allow 'time of war' to include the period after the cessation of hostilities but when emergency powers would still be required. This period would last until the Oireachtas resolved that an emergency no longer existed. Ireland's state of emergency to deal with World War II would last until September 1976 where upon it was repealed and then immediately replaced with a new emergency dealing with the conflict in Northern Ireland. This would last until the IRA ceasefire February 1995. Consequently, Ireland has been in a state of emergency for longer than it has been in a state of normalcy.

Ireland's constitutional emergency powers therefore focus entirely on political violence. [While courts have been reluctant to say whether the decision to declare a state of emergency is even justiciable](#); nevertheless, it would be difficult to argue that a pandemic could fall under the meaning of 'time of war or armed rebellion.' Consequently, Ireland's response to the coronavirus pandemic must take place entirely within the bounds of the Constitution and legislation that falls foul of constitutional rights and separation of powers provisions may be struck down as unconstitutional. Whether this is likely to occur, however, is another question.

# Measures Taken in Response to Coronavirus

In response to the coronavirus pandemic, Ireland enacted the [Health \(Preservation and Protection and other Emergency Measures in the Public Interest\) Act 2020](#) (hereinafter the Health Act 2020) and the [Emergency Measures in the Public Interest \(Covid-19\) Act 2020](#) (hereinafter the Emergency Act 2020). Contrary to nomenclature, it is the Health Act 2020 that actually contains the most problematic provisions from a human rights perspective.

## The Health Act

The Health Act 2020 amends an existing piece of legislation—the [Health Act 1947](#)—which was introduced to provide ‘a complete code of the law relating to the prevention of the spread of infectious disease’. The detention provisions in the 1947 Act were themselves designed to replace similar powers under the Emergency Powers (No. 46) Order 1940. This latter regime was enacted under the [Emergency Powers Act 1939](#), which derived its validity from a declaration of emergency under Article 28.3.3° of the Constitution in force as a result of the outbreak of World War II. It was therefore not subject to constitutional constraints.

Part III of the Health Act 2020 confers on the Minister for Health powers to make regulations ‘for preventing, limiting, minimising or slowing the spread of Covid-19’ as well as detailing a detention regime for potentially infected persons. Section 10 of the Health Act 2020 empowers the Minister for Health to pass regulations that can include the power to restrict travel to or from the state, require persons to stay in their homes and prohibit the holding of events. Section 10(i) further expands upon these already broad powers to allow the minister to enact ‘any other measures the Minister considers necessary in order to prevent, limit, minimise or slow the spread of Covid-19.’

The scope of the powers conferred on the Minister are vast and concerning from a human rights perspective. [Article 40.6.1°ii](#) for example, protects the right of citizens ‘to assemble peaceably and without arms’. Social distancing measures clearly impact upon the right to publicly protest and to organise and hold meetings of political organisations and trade unions. This right is fundamental in a democratic society. However, like similar provisions in international treaties such as Article 11 ECHR, this right can be interfered with if meetings ‘are determined in accordance with law to be calculated to cause a breach of the peace or to be a danger or nuisance to the general public.’ Proportionality will be key and this will vary as the pandemic progresses. The breadth of discretionary law-making authority conferred on the Minister also raises concerns as to the separation of powers; specifically, questions as to their compatibility with [Article 15.2.1°](#) which vests the sole and exclusive law-making power for the state in the Oireachtas.

Section 11 introduces new powers of ‘detention and isolation of persons in certain circumstances.’ A person can be detained under these provisions by a ‘medical officer of health’ acting ‘in good faith’. A detained person must be examined as soon

as possible 'and in any event no later than 14 days from the time the person has been detained. There is, however, no express time-limit on the duration which a person can be detained for under these provisions. A detained person can request that their detention be reviewed by a medical officer of health other than the officer who made the initial order on the grounds that they are not a potential source of infection.' However, the appeal process to the Minister for Health under the 1947 Act is not applicable to somebody detained under the Health Act 2020. Nevertheless, as an Article 28.3.3° emergency is not in effect, the constitutional safeguards pertaining to *habeas corpus* set out in [Article 40.4](#) still apply.

Part III is due to sunset on 9 November 2020, unless a resolution is passed by both Houses of the Oireachtas approving its continuation. There is no limit on how long such an extension could last and Ireland has a [poor track record of time-limited legislation](#) actually staying time-limited. The social welfare provisions in Part II of the Health Act sunset much earlier on 9 May with no provision for renewal. The reason for this is that Ireland is currently without a permanent Government following February's general election. Both pieces of legislation were enacted with cross-party support under the auspices of a caretaker government. It was therefore felt that a new permanent government would have to be in place by 9 May to enact further social welfare provisions given the impact that the economic measures would have on state finances and a programme of government.

## The Emergency Act

While the Health Act 2020 does contain some provisions pertaining to social welfare payments, the Emergency Act 2020 contains the majority of the state's economic response to the crisis as well as relaxing regulations pertaining to employing health professionals and armed forces personnel who have recently retired or left the profession.

The most striking aspect of this legislation is Part II which prohibits rent increases during the emergency period. Notably, the subject of rent freezes was a high-profile issue during Ireland's general election campaign at the start of 2020. Parties of the left [argued that a rent freeze was necessary in response to what was termed Ireland's 'housing emergency'](#). In contrast, centre-right parties opposed rent freezes with [Fianna Fáil arguing that rent freezes would be unconstitutional](#). This was based on a tenuous reading of a [case](#) where a rent freeze on certain arbitrarily-selected dwellings was found to be unconstitutional. Concern as to the constitutionality of a rent freeze to deal with the pandemic, however, are conspicuously absent.

## The Impact of the Lack of a Declaration of a State of Emergency

Although an Article 28.3.3° emergency is not in effect, it is unlikely that courts will find any of the new legislative provisions unconstitutional. Irish courts have been willing to stretch the meaning of the Constitution to accommodate exceptional powers in other situations without the need to declare a state of emergency. For

example the [Supreme Court case](#) rejected a challenge to the vast powers conferred on the Minister for Finance by the Credit Institutions (Financial Support) Act 2008 in response to the 2008 financial crisis on the grounds that these powers were ‘a permissible constitutional response to an exceptional situation’. While the powers in that case did not fall wholly within the Oireachtas’ ‘sole and exclusive’ law-making authority owing to the fact that they pertained to financial matters; nevertheless, the Supreme Court found the jurisprudence on the non-delegation doctrine to be ‘instructive and useful’ in upholding the constitutionality of the powers in question. It is probable that this principle of an ‘exceptional situation’ affecting the breadth of permissible powers that can be conferred on the executive will ensure the constitutionality of the provisions of the Health Act 2020, notwithstanding the lack of a *de jure* state of emergency.

Rent freezing measures are also likely to be upheld due to their temporary and proportionate nature and, ultimately, the flimsy constitutional basis upon which objections to rent freezes were built in the first place. Such objections were more symptomatic of a particular Irish phenomenon of the Constitution acting as a convenient scapegoat for Irish politicians to explain why, in their opinion, certain measures cannot be taken.

The problem with accommodating emergencies without an official declaration is that emergencies are supposed to limit exceptional powers to exceptional situations. When exceptional powers are introduced under the ordinary constitutional framework, this quarantining effect of the *de jure* state of emergency is lost. The measures are no longer limited to a clearly defined state of emergency. The power then, as [US Supreme Court Justice Robert Jackson](#) famously stated, ‘lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.’

A constitutional amendment would be required for Article 28.3.3<sup>o</sup> to be used to confront a pandemic. While concerns should remain with regards to how *de facto* emergencies affect constitutional constraints under normalcy, Article 28.3.3<sup>o</sup> is considerably more troublesome. Currently, the only limitation on what the state may do in an emergency is that it cannot reintroduce the death penalty. Everything else, in principle, is on the table, including detention without trial, extending of the life-time of the Dáil or vastly increasing the powers of the President. Indeed, it is unclear whether the Constitution itself could be amended using Article 28.3.3<sup>o</sup>, in which case, the entire constitutional order could be transformed. Recent worrying trends in Hungary should serve to underline why Ireland should take seriously the possibility of constitutional usurpation through the guise of emergency powers.

If Ireland were to expand the definition of emergency in Article 28.3.3<sup>o</sup>, the powers it enables would also need to be substantially curtailed. Here, Ireland could look to Article 15 ECHR which requires that all emergency measures taken are ‘proportionate to the exigencies of the situation’—a requirement notably absent from Article 28.3.3<sup>o</sup>. Furthermore, identifying certain constitutional provisions as non-derogable could also be followed. As such a change would require a referendum,

however, it is unlikely to happen any time soon and certainly not during the current pandemic.

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